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December 23, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 25, 2008

Case Number: TSO-0653

This Decision concerns the eligibility of xxxxxxxxxx (hereinafter referred to as "the Individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the Individual's access authorization should be granted.

I. BACKGROUND

The present case involves a 36-year old individual employed at a DOE Facility. On January 31, 2007, the Individual completed, signed and submitted a Questionnaire for National Security Positions form (QNSP) to the Local Security Office (LSO). Question 24(a) of the QNSP asked "Since age 16 or in the last seven years, whichever is shorter, have you illegally used any controlled substances . . ." Exhibit 7 at 29. The Individual checked the box labeled "yes" in response to this question. *Id.* The QNSP required that the Individual identify each illegal drug used during this period, the number of times each illegal drug was used, and the timeframe in which such use occurred. The Individual's QNSP indicated that he had used marijuana. *Id.* at 29-30. He estimated that he used marijuana 50 times during the estimated period beginning in January of 2000 and ending in February 2006. *Id.* The Individual's QNSP indicated that the Individual had used cocaine twice during an estimated period beginning in January 2000 and ending in December 2001. *Id.* The Individual's QNSP also indicated that the Individual had used ecstasy an estimated 12 times during an estimated period beginning in January 2000 and ending in December 2001. *Id.*

Question 24(c) of the QNSP asked "In the last seven years, have you been involved in the illegal purchase, . . . or sale of any narcotic, . . . stimulant . . . or cannabis *for your own intended profit or that of another?*" (Emphasis supplied). Exhibit 7 at 29. The Individual checked the box labeled "no" in response to this question. *Id.*

On April 3, 2008, the LSO conducted a Personnel Security Interview (PSI) of the Individual.¹ During this PSI, the Individual essentially provided the same information concerning his illegal drug use as he had in his QNSP. However, during this PSI, the Individual was asked: “have you ever purchased ecstasy?” The Individual responded by stating: “I did reimburse my friend for it.” Exhibit 8 at 28. The Individual was also asked: “Did you resell those pills to friends?” The Individual responded by stating: “Somebody may have paid me the same price I paid for it, yes.” *Id.* at 30. The Individual was asked if he ever profited from the sale of ecstasy, the Individual indicated that he had not. *Id.* at 31. The interviewer subsequently suggested that the Individual had provided a false answer to QNSP Question No. 24(c) because he had purchased and sold ecstasy. *Id.* at 56. The Individual responded by stating: “The discrepancy there is, I guess when I filled out this form I [did] not consider simply reimbursing someone for their cost to be purchase and sold, selling.” *Id.*

During the PSI, the Individual reported that he had used illegal drugs during a period in which he had been employed at a DOE facility managing radioactive substances and administering a safety program. DOE Exhibit 8 at 50-51.

The LSO determined that the Individual had used marijuana, ecstasy and cocaine and then provided false information concerning his drug use to the LSO. Moreover, the LSO concluded that the Individual had used these illegal drugs while employed as a health physicist responsible for radioactive substances at a DOE facility. An administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification Letter specifies three types of derogatory information described in 10 C.F.R. § 710.8(f), (k) and (l).²

The Individual filed a Request for a Hearing, which was forwarded to the Office of Hearings and Appeals (OHA) and I was appointed as Hearing Officer. At the hearing, the LSO presented no witnesses. The Individual presented five witnesses and testified on his own behalf. *See* Transcript of Hearing, Case No. TSO-0572 (hereinafter cited as “Tr.”). The LSO submitted 10 exhibits, marked as Exhibits 1 through 10, while the Individual submitted ten exhibits, marked as Exhibits A through J.

¹ The transcript of the April 3, 2008, PSI appears in the record as Exhibit 8.

² The Notification Letter alleges that the Individual has: (1) “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, . . . etc.). . . .” 10 C.F.R. § 710.8(k); and (2) “deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for Sensitive (or National Security) Positions, . . . a personnel security interview, . . . in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31.” 10 C.F.R. § 710.8(f), and (3) “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l)

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. ANALYSIS

Criterion K

Clearly, Criterion K was properly invoked by the LSO. The Individual has admitted that he used marijuana approximately 50 times between 1994 and 2006, ecstasy approximately 12 times between 2000 and 2001, and cocaine twice between 1999 and 2001. The Individual also admits that, on four to six occasions in 2000 and 2001, he had purchased ecstasy for his own use and sold it to friends without profiting from the transactions. Finally, the Individual has admitted that his former roommate used marijuana and that he patronizes a bar where some of the bartenders with whom he converses are known to him to use marijuana.

The use, possession, sale or distribution of an illegal drug, such as marijuana, cocaine or ecstasy, raises questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations. *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at 11 (Guideline H).*

The remaining question, under Criterion K, is whether the Individual has sufficiently mitigated the concerns about his judgment, reliability and willingness or ability to comply with laws, rules and regulations raised by his extensive illegal drug use history, which continued into the Individual's mid-thirties. The Individual has submitted evidence supporting his contention that he has discontinued using illegal drugs and intends to refrain from future illegal drug use.

There is no evidence in the record suggesting that the Individual's illegal drug use has continued after February 2006 or was more extensive than he has reported. The record includes a 91 page

report of background investigation prepared by the Office of Personnel Management (OPM).³ The OPM's report contains no evidence suggesting that the Individual's illegal drug use was more extensive than reported by the Individual or continued past February 2006. The Individual, moreover, presented the testimony of five character witnesses, as well as his own testimony, in support of his contention that he no longer uses illegal drugs and is committed to refraining from illegal drug use in the future. These character witnesses also testified that the Individual is a particularly honest person.

A senior health physicist, who had previously supervised the Individual in his occupation as a health physicist "for two or three years" at a DOE facility testified on the Individual's behalf. Tr. at 13, 22. She testified that the Individual was honest, trustworthy and possessed strong moral character, despite his history of illegal drug use. *Id.* at 14-16. This witness opined that she believed that the Individual would honor his commitment to refrain from future illegal drug use. *Id.* at 16.

A radiation physicist who, for "five to seven years" had formerly supervised the Individual at a DOE facility testified on the Individual's behalf. Tr. at 30. The radiation physicist also socialized with the Individual outside of work occasionally. *Id.* at 31. The radiation physicist described the Individual as "one of the more honest people that I've ever met or worked with" and as "extremely open and honest." *Id.* at 31-32. This witness opined that he believed that the Individual would honor his commitment to refrain from future illegal drug use, since when the Individual "says something, I have complete confidence that he will follow through on what he says." *Id.* at 32.

The Individual's present supervisor, a physicist employed at a DOE facility, testified on his behalf. The present supervisor testified that he had worked with the Individual since 2004. Tr. at 39. He testified that the Individual is honest. *Id.* at 41. The present supervisor has held a DOE clearance since 1996. *Id.* The present supervisor opined that he believed that the Individual would honor his commitment to refrain from future illegal drug use. *Id.* at 42, 47.

A close friend of the Individual, who has known him since they both attended graduate school together, testified on his behalf. She has been in the same social circle as the Individual since graduate school. Tr. at 57. She presently sees him once a month or so. *Id.* at 55. The friend testified that she had been present with the Individual on several occasions (always in social settings) when he used illegal drugs. *Id.* at 54. Many of the Individual's fellow graduate students were also social users of illegal drugs. *Id.* Most of the Individual's socializing with this witness did not involve illegal drug use. *Id.* at 55. They attend many of the same parties or get together after work. *Id.* at 56. There is no drug use at these parties. *Id.* The Individual does not intend to use drugs in the future. *Id.* at 56-57, 59. When the Individual started to consider applying for a clearance, he made it clear that he had to put his illegal drug use in the past. *Id.* The Individual's drug use began to taper off in 2003. *Id.* at 57. The Individual no longer uses illegal drugs. *Id.* It is possible that someone in their social circle uses illegal drugs but she is not aware of any such persons. *Id.* She has not observed the Individual using drugs for the past five

³ The OPM's report appears in the record as Exhibit 9.

years. *Id.* at 58. A lot of the Individual's illegal drug use occurred at the instigation of a former neighbor of his who has moved away and lost touch with the Individual. *Id.* at 60-62. The Individual is very honest. *Id.* at 60-61.

A nuclear physicist who works and socializes with the Individual testified on the Individual's behalf. The nuclear physicist testified that he has known the Individual since they worked together at a DOE facility in 2005. Tr. at 67. They socialize two or three times a month. *Id.* He goes to parties at the Individual's house. *Id.* at 67-68. He has never observed the Individual using illegal drugs. *Id.* at 68. He has not observed illegal drug use in the Individual's presence. *Id.* at 68-69. The Individual and he discussed the Individual's plans to avoid future illegal drug use and the Individual told him that he will not use illegal drugs in the future. *Id.* He testified that the Individual is honest. *Id.* at 69.

The Individual testified that most of his illegal drug use occurred during the period 2000 through 2002. Tr. at 74. At that time, he was using marijuana about once a month. *Id.* He stopped using illegal drugs for about three years because he had a girlfriend who didn't approve of his illegal drug use. *Id.* He returned to very infrequent marijuana use after he broke up with that girlfriend. *Id.* At that point, he would only use marijuana once or twice a year. *Id.* at 78. His illegal drug use was always confined to social situations on weekends. *Id.* at 74-75. He used cocaine twice, but didn't like it. *Id.* at 75. He has never been addicted to any of these illegal drugs. *Id.* at 79. The Individual testified that even if he were not to receive a clearance, he would not use illegal drugs in the future, because:

I don't see the point in it so much anymore. It was maybe a casual thing, and I think maybe the Q clearance made me realize that it's not worth—that this sort of casual once-a-year party thing, frankly, isn't all that important to me to – any kind of consequences.

Id. at 87. The Individual further testified that he quit using illegal drugs because:

I realized I was going to be working [at a secure DOE facility] in the future, I was going to be applying for a Q clearance, and at some point I said 'well, I haven't used marijuana in a long time, now would be – you know, it—that now is the time to say I'll never use it again.

Id. at 99.

The Individual also submitted documentary evidence supporting his assertion that he no longer uses illegal drugs and is committed to refraining from illegal drug use in the future. Exhibit I is a medical record reporting that a drug test administered to the Individual on September 4, 2008, tested negative. Exhibit J is a medical record reporting that a drug test administered to the Individual on July 31, 2008, tested negative.

The evidence in the record convinces me that the Individual has not used illegal drugs since February 2006, and will not use illegal drugs in the future.

At the time of the Individual's PSI, the Individual had a roommate who he believed was a marijuana user. A letter from this now-former roommate indicating that she has moved out of the Individual's home appears in the record as Exhibit G. The Individual also testified that this roommate had moved out. Tr. at 85. The Individual further testified he has no close friends whom he "hangs-out" with who still use illegal drugs. *Id.* I therefore find that the security concerns raised by the Individual's association with known illegal drug users have been mitigated.

The Individual's extensive and long-term pattern of illegal drug use raises substantial doubts about his willingness and ability to follow laws, rules and regulations. When DOE allows individuals to have access to classified information or access to special nuclear material, it has to be able to trust that those individuals will comply with those laws, rules and regulations that govern their use. A twelve-year long pattern of disregarding the laws governing illegal drug use brings into question the Individual's ability or willingness to do so.

However, the passage of two and a half years since his last illegal drug use, as well as the Individual's testimony and that of his five character witnesses has mitigated this concern. As discussed above, each of these character witnesses convincingly testified as to the Individual's honesty. Moreover, three of these witnesses, each of whom have supervised his work at DOE facilities, attested to the Individual's commitment to excellence as an employee, commitment to safety and adherence to the highest of safety standards.

The senior health physicist testified that the Individual was an excellent employee who was very detail oriented, who implemented a DOE-mandated radiation safety program in an exemplary manner. Tr. at 13-14. The senior health physicist, who has worked in and consulted in many DOE facilities, described this program as "one of the strongest in the DOE complex." *Id.* at 15. The radiation physicist testified that the Individual's work was "fantastic" and that the Individual was very thorough. *Id.* at 30. The present supervisor testified that the Individual is always "awake, aware, cogent, hardworking, focused and diligent" at work. *Id.* at 41. He further described the Individual's attitude towards safety as "exemplary." *Id.* at 47.

Finally, it is clear from the record that the Individual is a very dedicated scientist who greatly values the scientific opportunities that a DOE security clearance would allow him. The Individual fully realizes that any future illegal drug use would jeopardize these opportunities. The Individual's present supervisor testified that he had several discussions with the Individual about the responsibilities and obligations of maintaining a DOE security clearance and working in an environment where a clearance is necessary. Tr. at 45-46. The present supervisor also testified that the Individual understands that the national security could be compromised if he were to fail to comply with security procedures. *Id.*

Guideline H of The Adjudicative Guidelines sets forth conditions that could mitigate security concerns raised by illegal drug use. The Individual has shown that the conditions set forth at ¶ 26(a) and at ¶ 26(b) of Guideline H have been met in the present case. I have found that the Individual's illegal drug use is unlikely to recur. I have also found that the Individual's past

illegal drug use no longer continues to cast doubt on the Individual's current reliability, trustworthiness, or good judgment. Moreover, the Individual has demonstrated that he has disassociated himself from known drug-using associates and contacts and has abstained from using illegal drugs for over two and a half years.

Criterion F

The Notification Letter alleges that the Individual provided a false answer to QNSP Question 24(c).⁴ That question asked "In the last seven years, have you been involved in the illegal purchase, . . . or sale of any narcotic, . . . stimulant . . . or cannabis *for your own intended profit or that of another?*" (Emphasis supplied). Exhibit 7 at 29. The Individual checked the box labeled "no" in response to this question. *Id.* During the PSI, the Individual indicated that he had purchased ecstasy for his personal use. During the PSI, the Individual also indicated that he had provided friends with ecstasy and then had been reimbursed at no profit to himself.

It is clear that the Individual was not attempting to deceive the LSO by answering "no" to QNSP Question 24(c). The text of the question clearly specifically limits the scope of this question to circumstances where the Individual would have engaged in a purchase or sale of illegal drugs where he (or another person) would have profited. During the PSI, the Individual indicated that his purchases of ecstasy were limited to those occasions where he "reimbursed my friend for it" and that his sales of ecstasy were limited to those occasions where he provided ecstasy to friends and was reimbursed for his expense. Exhibit 8 at 28-31. Because the record unambiguously shows that the Individual's answer to QNSP Question 24(c) was accurate, I find that Criterion F was not properly invoked by the LSO.

Criterion L

The Notification Letter invokes Criterion L, alleging that:

Between May 1995 and January 2007, [the Individual] was employed by [a DOE facility], in part as a health physicist responsible for radioactive substances. He admitted that he understood his [former] employer's policy prohibiting the use of illegal drugs. Despite his understanding of the policy, he continued to use marijuana and began to use ecstasy and cocaine between 1994 and 2006.

Statement of Charges at ¶ III. The record unambiguously shows that his former employer's policy only prohibited the use of illegal drugs at work or on company time. (The Individual's former employer was a non-secure DOE facility, where most of the employees did not maintain security clearances). The senior health physicist, who supervised the Individual at his former

⁴ The Notification Letter also alleged that the Individual "signed and dated a QNSP certifying that he only used marijuana 50 times between January 2000 and February 2006. Despite this certification, during the PSI . . . he admitted to using marijuana over 50 times between 1994 and February 2006." Statement of Charges at ¶ I.B. However, this allegation was dismissed at the DOE Counsel's request. Tr. at 5-7.

employer, testified that the former employer's drug policy could be summarized as "'you can't use drugs when you are on site . . . they only addressed when you came onto the site . . . it was never in a policy that you can't [use illegal drugs] when you are off site.'" Tr. at 19-20. More importantly, a review of the former employer's drug policy, which was submitted as Exhibit 10 at the hearing, shows that it clearly does not prohibit illegal drug use outside of the site or official activities if it does not affect an employee's performance. Tr. at 26; Exhibit 10.

During the PSI, the Individual was asked "you were using drugs knowing that it was against [the former employer's] policy, is that right?" The Individual responded by stating "yes." Exhibit 8 at 51.⁵ Accordingly, it appears that the Individual thought he was violating the former employer's policy by continuing to use illegal drugs (even if he was not actually doing so). By doing so, he was exhibiting a willingness to disobey his former employer's rules or policy. The Individual's willingness to disobey his former employer's rules or policies raises concerns about the Individual's honesty, trustworthiness and reliability. Accordingly, the LSO properly invoked Criterion L. However, I find that the security concerns raised under Criterion L are mitigated for the same reasons discussed above under Criterion K, where I discussed the evidence in the record that convinced me that the Individual is honest, and can be trusted and relied upon in the future.

IV. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Criteria K and L. With regard to Criterion F, however, the evidence convinces me that the factual underpinnings of the allegations are incorrect. However, as detailed in this decision, I found that the Individual has mitigated the security concerns raised under Criterion K as well as the security concerns set forth under Criterion L. In the end, I find that the Individual has demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the Individual's access authorization should be granted at this time. The DOE may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: December 23, 2008

⁵ The Individual also admitted that he had access to radioactive substances while he worked for the former employer. Exhibit 8 at 51. The Individual's use of illegal drugs while employed in a position where he was called upon to handle radioactive substances evidences a lapse in judgment. However, that lapse in judgment is not significant enough to disqualify him from holding a DOE security clearance, especially since two and a half years have passed since this lapse in judgment and there is no evidence in the record that he violated any rules, other than federal and state drug laws, by doing so.